4

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 152.

JOHN POWERS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

FILED OCTOBER 23, 1909.

(21,881.)

(21,881.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 152.

JOHN POWERS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 1, 1911.

1 *Opening of Court.*

Monday, August 9, 1909.

UNITED STATES OF AMERICA,
Western District of Virginia, ss:

At a Regular Term of the District Court of the United States for the Western District of Virginia, Begun and Held at Big Stone Gap on the 9th Day of August, 1909.

Present:

Hon. Henry C. McDowell, Judge.
S. Brown Allen, Marshal.
H. Peyton Gray, Clerk.
C. C. Cochran, Deputy Clerk.
Thomas Lee Moore, United States Attorney.

Among other proceedings:

Impaneling Grand Jury.

J. A. G. Hyatt, Foreman; E. C. Robinett, J. L. D. McConnell, R. E. Jennings, John W. Fugate, F. W. Blondell, L. A. Miller, T. J. Torbet, T. K. Colly, William Necessary, E. B. Scott, H. G. Peery, Jacob Kidner, J. P. Gibson, J. H. Mead, H. G. Charles, Thomas Stilton, James H. Collier and Thomas Eldridge were impaneled a grand jury of inquest for the body of the United States of America for the Western District of Virginia, at Big Stone Gap, Virginia.

Impaneling Petit Jury.

This day, at the opening of court, the Petit Jurors were called and impaneled as follows:

Jury #2. J. Saunders Gillespie, J. S. Wimmer, John B. Thompson, John H. Dotson, John A. Belcher, M. B. Ratliff, C. H. Cowen, Elbert Campbell, B. X. Baldwin, J. P. Shelburn, C. V. Young and C. F. McPherson.

2 *Adjournment of Grand Jurors.*

And the Grand Jury, having completed their deliberations for the day, are adjourned until tomorrow morning at 9.00 o'clock.

Opening Court.

August 10th, 1909.

UNITED STATES OF AMERICA,
Western District of Virginia, ss:

At a Regular Term of the District Court of the United States for the Western District of Virginia, Begun and Held at Big Stone Gap on the 10th Day of August, 1909.

Present:

Hon. Henry C. McDowell, Judge.
S. Brown Allen, Marshal.
H. Peyton Gray, Clerk.
C. C. Cochran, Deputy Clerk.
Thomas Lee Moore, United States Attorney.

The Grand Jury impaneled on yesterday, returned into Court, pursuant to adjournment, and preferred the following indictment: No. 360, United States against John Powers, violating Sections 3258, 3279, 3281 and 3242, Revised Statutes, "A True Bill," which was, in words and figures, as follows, to-wit:

Form No. 124.

Indictment for Illicit Distilling, etc.

UNITED STATES OF AMERICA:

In the District Court of the United States for the — Division of the Western District of Virginia, August Term, 1909.

The Grand Jurors of the United States, elected, impaneled, sworn, and charged to inquire for the body of said Western District of Virginia, upon their oaths present:

First Count. That on the — day of — A. D. 1908 and 1909 in said Western District before the finding of this indictment, and within the jurisdiction of the said court, in the County of Dickenson, John Powers did unlawfully have in his possession and custody, and
3 under his control, a still and distilling apparatus for the production of spirituous liquors set up without having the same registered as required by law, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States.

Second Count. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that at the time and place and within the jurisdiction, aforesaid, the said John Powers did unlawfully carry on the business of a distiller of spirituous liquors, without having given bond as required by law, contrary to the form of the Statute in such

case made and provided, and against the peace and dignity of the United States.

Third Count. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that at the time and place, and within the jurisdiction aforesaid, the said John Powers did unlawfully engage in and carry on the business of a distiller of spirituous liquors, with intent to defraud the United States of the tax of the spirits distilled by him, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States.

Fourth Count. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that at the time and place, and within the jurisdiction aforesaid, the said John Powers unlawfully did work in a distillery for the production of spirituous liquors, upon which no sign bearing the words "Registered Distillery" was placed and kept as required by law, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States.

Fifth Count. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that at the time and place, and within the jurisdiction aforesaid, the said John Powers unlawfully and knowingly did carry and convey, to-wit: ten gallons of distilled spirits from a distillery for the production of spirituous
4 liquors, upon which no sign bearing the words "Registered Distillery" was placed and kept as required by law, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States.

Sixth Count. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that at the time and place, and within the jurisdiction aforesaid, the said John Powers unlawfully and knowingly did carry and deliver raw material, to-wit: ten bushels of meal to a distillery for the production of spirituous liquors, on which no sign bearing the words "Registered Distillery" was placed and kept as required by law, contrary to the form of the Statute in such case made, and provided, and against the peace and dignity of the United States.

Seventh Count. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that at the time and place, and within the jurisdiction aforesaid, the said John Powers did unlawfully carry on the business of a retail liquor dealer, without having first paid the special tax as required by law, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States. Thomas Lee Moore, United States Attorney, which said indictment was endorsed as follows:

No. 360. In the United States District Court, at Big Stone Gap, Western District of Virginia. United States vs. John Powers, Dickenson County. Illicit Distilling, etc., violating Sections 3258, 3279, 3281 and 3242, Revised Statutes. A True Bill. J. A. G. Hyatt, Foreman of Grand Jury. Filed in open court this 10th day of August, 1909. C. C. Cochran, Deputy Clerk. Witnesses: J. W. Deskins, James H. Jennings and Preston Powers.

5 UNITED STATES OF AMERICA,
Western District of Virginia, ss:

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Big Stone Gap on the 11th Day of August, 1909.

Present:

Hon. Henry C. McDowell, Judge.
S. Brown Allen, Marshal.
H. Peyton Gray, Clerk.
C. C. Cochran, Deputy Clerk.
Thomas Lee Moore, United States Attorney.

Among other proceedings:

UNITED STATES, Plaintiff,
versus
JOHN POWERS, Defendant,

Vio. Secs. 3258, 3279, 3281, and 3242, R. S.

This day came the United States Attorney, and the defendant was set to the bar in the custody of the Marshal and pleaded "not guilty" to the indictment found against him;

Whereupon came the following jury to-wit: J. Saunders Gillespie, J. S. Wimmer, John B. Thompson, John H. Dotson, John A. Belcher, M. B. Ratliff, C. H. Cowen, Elbert Campbell, B. N. Baldwin, J. P. Shelburn, C. V. Young and C. F. McPherson, who being selected and tried in the manner prescribed by law, the truth of and upon the premises to speak, and having heard the evidence; the arguments of counsel and charge of the Judge, retired to consider of their verdict, and upon their oaths do say: "We, the Jury,
6 find the defendant, John Powers, guilty as charged in the within indictment. This August 11th, 1909, C. V. Young, Foreman";

Whereupon, the defendant being at the bar of the court, and having assigned no cause why judgment should not be pronounced, it is considered by the court that the said John Powers be imprisoned in the Russell County jail for a period of thirty days, commencing on the day said defendant is committed to said jail; and that the United States of America do recover of and from the said defendant the sum of one hundred dollars ($100.00) fine and her costs in this behalf expended. And for the collection of said fine and costs a writ of Fiere Facias, but not a capias pro fine, may issue after ten days from this date at the Instance of the United States Attorney. And said defendant having assigned to the court good cause for suspending execution of so much of the above sentence as imposes imprisonment, and said defendant having entered into a recognizance in the penalty of $200.00 with waiver of the homestead exemption, conditioned that said defendant will, on the 15th day of

November, 1909, surrender himself to the Deputy Marshal for Russell County, at Lebanon, Virginia, it is further ordered that execution of so much of the foregoing sentence as imposes imprisonment be, and it is hereby, suspended until November 15th, 1909, unless prior to said date (November 15th, 1909) an appeal has been taken by the defendant from the judgement of this court and if an appeal has been taken by the defendant, then, the execution of so much of the above sentence as imposes imprisonment be, and it is hereby, suspended until the first day of the next term of this court, and this cause is continued.

7 *Bill of Exceptions.*

UNITED STATES, Plaintiff,
vs.
JOHN POWERS, Defendant.

Violating Sections 3258, 3279, 3281, and 3242.

Be it remembered that on the hearing of this case the United States to maintain the issue on its part, introduced M. P. Colly, Deputy Marshal for Dickenson County, Virginia, as a witness, who stated that he was present at the time the defendant, John Powers, had his preliminary hearing for this alleged offense before the United States Commissioner, W. C. D. Rush, of Dickenson County, Virginia, and heard John Powers, the defendant, testify. He was then asked to state what Powers said as a witness at that hearing; but the defendant, by his counsel, objected and avowed that there was testimony before the said Commissioner by a witness of the Government to the effect that John Powers, the defendant, was seen near Preston Powers's home about four miles from the defendant's home at "Still place" beating apples; and that after the Government closed its side of the case the defendant, John Powers, voluntarily took the stand in his own behalf in the absence of counsel and without any warning or admonition by the Commissioner, and testified that he was about thirty steps (30 steps) of a still place as testified by the Government witness beating apples, that Preston Powers had hired him to work for him at the price of seventy-five cents (75¢) per day and that he put him to beating apples; that he (witness) had no interest in the apples, or the product thereof, and had no interest or control of any still, but was merely hired to work by the day at the above mentioned price. That was all his testimony in his behalf in chief, and that on cross examination the Commissioner did not ask him any question concerning the making of any brandy or furnishing
8 any material to a still at the place near Preston Powers's home; but the Deputy Marshal, M. P. Colly, (witness on the stand) asked the said John Powers if he had not, at another time and place, within two years before the warrant, on which he was being tried was sworn out, work- at a distillery; but John Powers objected to answering the said question; that he refused to answer until informed by said Commissioner and Deputy Marshal that if he did

not answer the question he would be committed to jail till he did answer and not till he was thus compelled to answer did he answer the said question. That the said John Powers was all that time without counsel.

The defendant by counsel objected to the witness answering for the following reasons:

That the answer to the above question under the above mentioned circumstances defendant claims was not cross examination; was not such a judicial admission as was evidence; that it was in violation of the Constitution of the United States and the amendments thereof; that was compelling a person to become a witness and give evidence against himself; that said John Powers by voluntar-y going on the witness-stand did not waive his constitutional privilege, except as to cross examination; that a person can not be compelled to answer such questions on cross examination. But the court overruled the objection and permitted the witness to testify, as follows: The witness testified that, at the time and place and under the circumstances as stated by the defendant's counsel in the aforesaid avowal and to the question as propounded under the circumstances as contained in the aforesaid avowal. That John Powers said: "he had worked at a distillery and made some brandy last fall near his (defendant's)
house and he paid Preston Powers to assist him".
9 That it was at a different time and about four miles from
where he worked for Preston Powers beating the apples. That John Powers made the above statements under the circumstances at the time and place as stated in avowal of defendant's counsel above mentioned. To which said ruling of the court in overruling the objection to the foregoing question and permitting the witness to testify the defendant by his counsel excepted. The defendant by his counsel then moved the court to strike out and reject the foregoing testimony of the witness, M. P. Colly, and instruct the jury to disregard the same in their deliberation, for the reasons before stated; but the court overruled said motion of the defendant and permitted the jury to consider the same. To which said several actions, opinions and ruling of the court in overruling the objections to the testimony above in permitting the said Colly to answer the question aforesaid and refusing to strike-out and reject the same, the defendant by his counsel excepted and prays that this his bill of exceptions may be signed, sealed, and made a part of the record in this case, which is accordingly — on this 25th day of September, 1909.

HENRY C. McDOWELL, *Judge*. [SEAL.]

10 In the District Court of the United States for the Western District of Virginia, Continued and Held at Big Stone Gap, Virginia, on the 25th Day of September, 1909.

UNITED STATES, Plaintiff,
vs.
JOHN POWERS, Defendant.

Violation of Sections 3268, 3279, 3281, and 3242, R. S.

Petition for an Order Allowing a Writ of Error and Supersedeas from the Final Judgement Heretofore Entered in This Case to the Supreme Court of the United States.

John Powers, the defendant in the above styled case, feeling himself aggrieved by the final judgement heretofore made and entered by this court in this case on the 11th day of August, 1909 (that being the third day of the August Term at Big Stone Gap), by which judgement it was ordered and adjudged that this defendant be punished by confinement in the County jail of Russell County, Virginia, for a period of thirty days, said period of imprisonment to begin on the fifteenth (15th) day of November, 1909, and that he pay the United States a fine, as part of said punishment, of one hundred dollars ($100.00) and that the Plaintiff recover of him its costs in this behalf expended to be taxed by the clerk; comes now, by S. H. Sutherland as his attorney, advocate and counsel and petitions this court for an order allowing him, the said defendant, a writ of error to and to allow him to prosecute the said writ of error to the said final judgement in the Honorable United States Supreme Court under and according to the laws and Statutes of the United States in such case made and in this behalf provided, as the same involves "the constitution and application of the Constitution of the United States" and also that an order be made fixing the amount of security, if any, which the defendant shall give and furnish to
11 prosecute said writ, and upon giving such security, if any be required, all further proceedings in this court be suspended and stayed until the determination of the said writ of error by the said Supreme Court of the United States, and such further orders as may be necessary or convenient to protect this defendant's rights pending the prosecution of said writ of error be entered.

Your petitioner makes the following assignment of errors in the record in the prosecution of this suit and the judgment:

(1) The court erred in overruling the petitioner's demurrer to the fourth count in the indictment in this case, as the same was not set forth with the certainty in such cases required,—certainty to a certain intent in particular.

(2) The court erred in permitting the witness, M. P. Colly, to testify as to what the defendant testified to at the preliminary examination before Commissioner Rush, for the following reasons, viz:

(A) It was not such an admission as amounted to a judicial admission.

(B) The question asked the defendant on cross examination was not cross examination and when he went on the stand he only waived his privilege as to cross examination and his constitutional privilege then protected him.

(C) The question was not cross examination and as to such question he became the Government witness and compelling the witness to answer was in violation of the Constitution of the United States and the fifth amendment thereto, which provides that "no person shall be compelled in any criminal case to be a witness against himself."

12 (D) The defendant could stop at any place he choose, and cross examination could only go to facts and circumstances connected with his direct examination.

(E) It was extorted by fear, and he could claim his privilege at a subsequent trial.

(F) If he refused to answer any question on cross examination, he could not be punished for it, but his testimony in chief could be stricken out, or the presumption against him for refusing to answer was the only penalty for his refusal.

(G) The defendant was never warned by the Commissioner of his privilege, and the extent of the cross examination if he testified;

(I) voluntarily going on the stand and giving testimony at the preliminary trial was not a waiver of the constitutional privilege as to such testimony at a later stage.

(3) It was error for the court to refuse to strike out from the consideration of the jury the testimony of the witness, Colly, at the request of the defendant.

For the foregoing reasons, and others to be assigned at bar, your petitioner prays that a writ of error to the Supreme Court of the United States be granted, and that the judgment of the District Court be reversed, annulled, vacated and set aside.

And your petitioner will ever pray, etc.

S. H. SUTHERLAND, *P. Q.*

September 25th, 1909. Writ of error allowed as prayed for.

HENRY C. McDOWELL,
District Judge.

13 *Writ of Error.*

The President of the United States to the Honorable the Judge of the District Court of the United States for the Western District of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, between the United States of America and John Powers, a manifest error hath happened, to the great damage of the said John Powers as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be

therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twenty-fifth day of October 1909, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States Supreme Court, the 25th day of September, in the year of our Lord one thousand nine hundred and nine, and of our Independence the 134th year.

[Seal United States Circuit Court, Western District of Virginia.]

H. PEYTON GRAY,
Clerk United States Circuit Court
for the W. D. of Virginia.

September 25th, 1909.

Allowed by
HON. HENRY C. McDOWELL,
U. S. District Judge.

Return.

THE UNITED STATES OF AMERICA,
Western District of Virginia, ss:

In obedience to the command of the within writ, I herewith transmit to the Honorable the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

Witness my hand and the seal of the *seal of the* said District Court, at Abingdon, in said District, this 11th day of October A. D. 1909.

[Seal United States Circuit Court, Western District of Virginia.]

H. PEYTON GRAY, *Clerk.*

14 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the clerk's office of the United States Supreme Court, in the city of Washington, D. C. on thirty days from this date pursuant to a writ

of error filed in the clerk's office of the District Court of the United States for the Western District of Virginia at Big Stone Gap, Va., wherein John Powers is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said John Powers as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry C. McDowell, United States District Judge this the 25 day of September, 1901.

[Seal United States District Court, Western District of Virginia.]

HENRY C. McDOWELL,
United States District Judge.

[Endorsed:] Citation. John Powers, Pl'ff in Error, vs. United States, Def't in Error. I hereby accept service. Tho's L. Moore. United States Attorney for Western District of Virginia. Sept. 25, 1909.

15 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Western District of Virginia, ss:

I, H. Peyton Gray, Clerk of the District Court of the United States for the Western District of Virginia, at Abingdon and Big Stone Gap, do hereby certify that the foregoing is a true and complete transcript of the record in the case of the United States of America vs. John Powers, No. 360, upon an indictment for the violation of Sections 3258, 3279, 3281 and 3242 of Revised Statutes of the United States, for the purpose of appellate proceedings in the United States Supreme Court in which said John Powers is plaintiff in error.

In testimony whereof I hereunto sign my name and affix the seal of the Court, at Abingdon, in said District, this 11th day of October, one thousand nine hundred and nine, and the 134th year of our Independence.

[Seal United States District Court, Western District of Virginia.]

H. PEYTON GRAY,
Clerk of the United States District Court for the Western District of Virginia.

Endorsed on cover: File No. 21,881. W. Virginia D. C. U. S. Term No. 152. John Powers, plaintiff in error, vs. The United States. Filed October 23d, 1909. File No. 21,881.

Supreme Court of the United States.

JOHN POWERS, Plaintiff in Error,

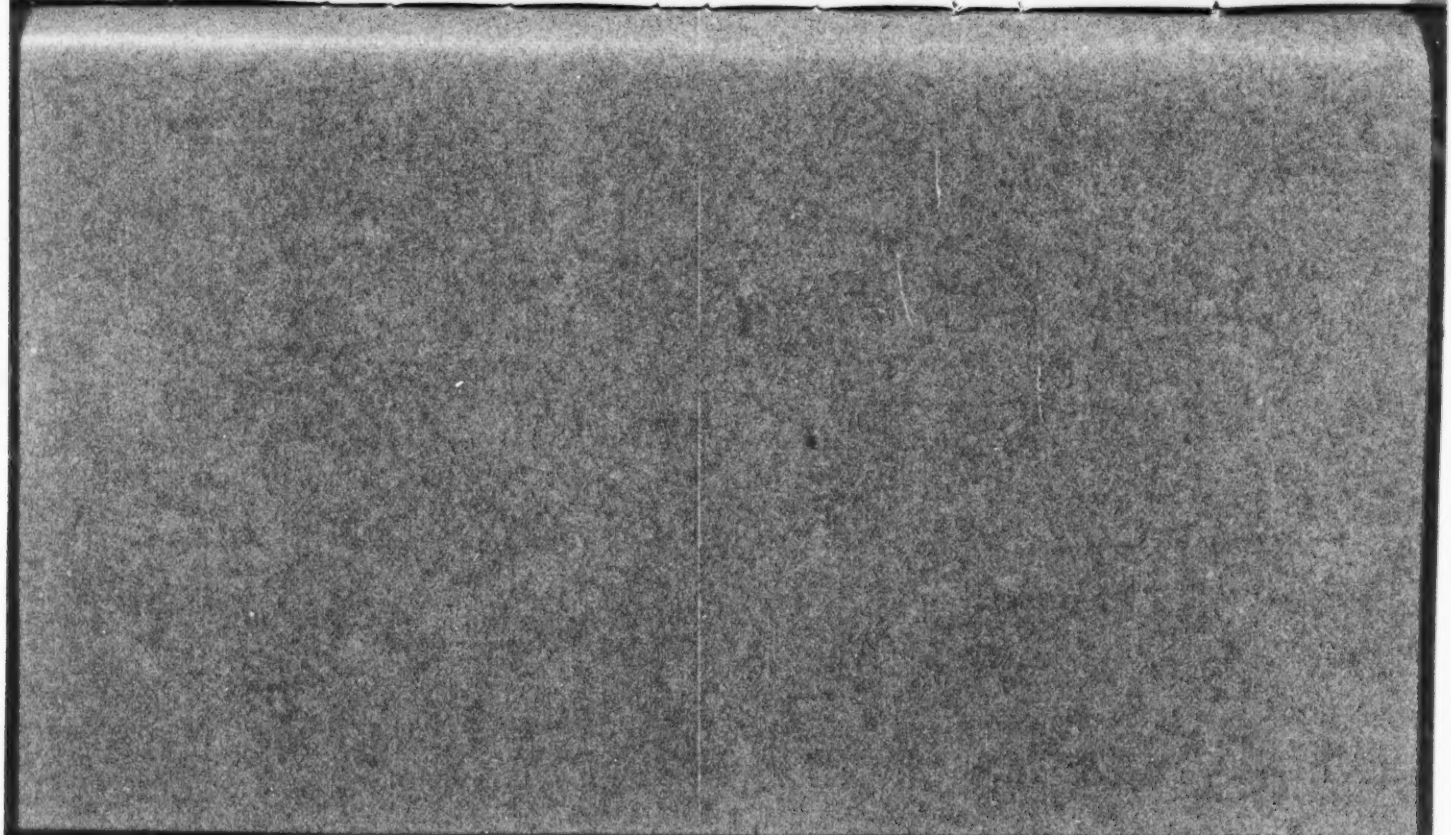
vs. } No. 152.

UNITED STATES, Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF OF PLAINTIFF IN ERROR.

S. H. SUTHERLAND,
R. A. AYERS,
Attorneys for Plaintiff in Error.



Supreme Court of the United States.

JOHN POWERS, Plaintiff in Error,

vs. } No. 152.

UNITED STATES, Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF OF PLAINTIFF IN ERROR.

John Powers, the Plaintiff in Error, was brought before W. C. D. Rush, United States Commissioner for Dickenson County, Virginia, by Deputy Marshall, M. P. Colley, to answer a warrant issued by the said Commissioner for violating the Revenue Laws (the form of the warrant or the section of the Statutes is not given). On the trial before the Commissioner, Powers in the absence of counsel and without any warning or admonition by the Commissioner, voluntarily took the stand in his own behalf to explain his presence near "a still place," and after his explanation the Commissioner did not ask him anything concerning his connection with that distillery, but permitted the Deputy Marshall to ask him if he had not at another time and place worked at a distillery. Powers objected to answering the question; and refused to do so until informed by the Com-

missioner and Deputy Marshall that if he did not answer the question so propounded him, he would be committed to jail and there kept till he did answer. And under this compulsion, still being without counsel, answered that he had at a place about four miles distance from where he was seen working at this distillery and a year previous made some brandy. Powers at this testimony was bound over to answer an indictment (R. P. 5) and at a regular term of the United States District Court held at Big Stone Gap, Virginia, for the Western District of that state, commencing August the 9th, 1909, a grand jury was empannelled (but not summoned nor sworn), which on the following day returned an indictment against the Plaintiff in Error, (or more accurately speaking a bill styled an indictment) (R. P. 2); upon which said indictment on the following day the defendant after being arraigned and plead "not guilty," was tried by a jury empannelled but not summoned nor sworn and convicted and sentenced to thirty days in jail and to pay a fine of one hundred dollars, (R. P. 4). During the trial the United States to maintain the issue introduced M. P. Colley, the Deputy Marshall, of Dickenson County, and was asked what Powers said as a witness at the hearing before the Commissioner, but the defendant objected to said question and any answer, avowing:

> "There was testimony before the said Commissioner by a witness for the Government to the effect that John Powers, the defendant, was seen near Preston Powers' home, about four miles from the defendant's home at a 'Still Place' beating apples; and that after the Government closed its side of the case the defendant, John Powers, voluntarily took the stand in his own behalf in the absence of counsel and without any warning or admonition by the Commissioner, and testified that he was about thirty steps of the still place as testified by the Government witness beating apples, that Preston Powers had hired him to work for him at the

price of seventy-five cents per day, and that he put him to beating apples; that he (witness) had no interest in the apples or the product thereof, and had no interest or control of any still, but was merely hired to work by the day at the above mentioned price. That was all his testimony in his behalf in chief, and that on cross-examination the Commissioner did not ask him any questions concerning the making of any brandy or furnishing any material to a still at the place near Preston Powers'home; but Deputy Marshall, M. P. Colley, (witness on the stand) asked the said John Powers if he had not at another time and place, within two years before the warrant, on which he was being tried was sworn out, worked at a distillery; but John Powers objected to answering the said question; that he refused to answer, until informed by said Commissioner and Deputy Marshall, that if he did not answer the question he would be committed to jail till he did answer and not till he was thus compelled to answer did he answer the said question."

That the said John Powers was all that time without counsel and counsel assigned several reasons why under the circumstances the witness should not have testified as to what the defendant said at that trial but the court overruled the objections and permitted Colley to testify, as follows:

> "At the time and place and under the circumstances stated in the foregoing avowal and to the question as propounded under the circumstances as contained in the aforesaid avowal. That John Powers said that he had worked at a distillery and made some brandy last fall near his house, and he paid Preston Powers to assist him. That it was at a different time and about four miles from where he worked for Preston Powers. That John Powers made the statement under the circumstances as stated in the aforesaid avowal",

to which ruling of the court the defendant at the time ex-

cepted. At the conclusion of Colley's testimony the defendant moved the court to strike out his testimony and instruct the jury to disregard the same in their deliberation, but the court overruled said motion and the defendant again excepted.

ASSIGNMENT OF ERROR.

1st. There was no venire facias summoning the grand jury which found this purported indictment.

2nd. The said grand jury was not sworn and consequently could not find an indictment.

3rd. The indictment was defective and the demurrer should have been sustained to the fourth and sixth counts.

4th. The petit jury that tried this case was not sworn nor summoned.

5th. The testimony of Colley was illegal and incompetent testimony and should have been rejected when offered and if received stricken out on counsel's motion.

In taking up the foregoing assignments of error we submit that the 2nd, 3rd and 5th, are decisive of the merits of this case and for that reason will notice them more closely than the other two, whilst the 1st and 4th are irregularities for which this case must be reversed, yet these are only errors that might be cured at another trial, whilst the others would now make any further efforts on the part of the Government unnecessary because of the Statute of Limitations.

I.

There can be no grand jury for a United States court unless ordered by the Judge, and the only method of summoning a grand jury is by venira facias. Rev. Stats. Sections 803, 810; 4 Fed. Stat. Anno. 742,-744; U. S. Antz 16 Fed. Rep. 119; U. S. v. Reed, 2nd Blatch. 435.

II.

The grand jury which returned this bill of indictment was never sworn, and therefore could not return a true bill

of indictment. Whilst this assignment of error was not contained in the original assignment, yet it is of such importance that we now call the court's attention thereto, as a grand jury to be legally organized must be sworn. Ridling v. State, 56 Ga. 601. A grand jury being an informing and an accusing body it would be dangerous to the liberties of the citizens if the charges they prefer were not sworn to, in fact, this was deemed of such importance by the framers and makers of our Constitution that it has been made a part of the Supreme Law of this land. No person being required to answer for any crime unless upon the accusation styled an indictment returned by a grand jury and their authority to do so is found in their oath. Under Article V of the Amendment to the Constitution no court of the United States has authority to try a person without an indictment returned by a grand jury for an offense of this kind.

> "The indictment here referred to is a presentation to the proper court *under oath* by a grand jury. Ex Parte Bain, 121, U. S. 1; 30 L. Ed. 849."
>
> "The record must show that all the jurors were sworn. Rowe v. State, 2 Soth. (Ala.) 459."
>
> "No person shall be required, according to the fundamental law of the country, to answer for any of the higher crimes unless this body x x x x x x x x x shall declare upon careful deliberation, *under the solemnity of an oath* that there is good reason for his accusation and trial." Justice Fields Charged the Grand Jury 2nd Sawy. C. C. 667; see also Bishp. Crim. Proced. Sec. 1357; Barker v. State, 39 Ark. 180; Lyman v. People, 7 Bradd. (Ill.) 345; Foster v. State, 31 Miss. 421; Abram v. State, 25 Miss. 589; Stokes v. State, 24 Miss. 621; 4 Bl. Com. 302; 1 Chit. Crim. L. 178; Cooley's Const. L. 318.

It was also held in Stokes v. State, 24 Miss. 621, that a

grand jury which is not empannelled according to the statute has no power to find a valid indictment. See also McQuillen v. State 8 S. & M. (La.) 587. But it may be urged that because this grand jury was empannelled it will be presumed that they were sworn. We respectfully submit that it takes both empannelling and swearing to constitute a grand jury. Whatever is essential in a criminal proceeding to deprive a person of his liberty must appear of record and nothing is taken by intendment or implication. Ball's case 140 U. S. 118; 35 L. Ed. 378; Hopt. v. Utah, 110 U. S. 574; 28 L. Ed. 262; U. S. v. Crane, 162 U. S. 625; L. Ed. 1097; Barnes' Case 92 Va. 722; Jones' Case 87 Va. 63; Spurgeon's Case. 86 Va. 652; Cawood's Case, 2 Va. Cases 527.

> 'The statement in a record that the court empannelled a jury does not necessarily imply that the jury was sworn." Rich v. Peoples, 1 Tex. Ap. 206.
>
> "To sustain a conviction of a crime it is essential that the record show affirmatively that the grand jurrors were sworn. No inference that they were sworn can be drawn from the word 'empannelled' in the record." Layman v. People, 7 Bradd. (Ill. App.) 345.
>
> "Empannelling has nothing to do with drawing, selecting,or swearing jurors, but means simply making a list of those who have been selected." Zapf v. State, 35 Fla. 210; 7 Soth. Rep 225; see also State v. Potter, 18 Conn. 166; Porter v. People, 7 How. Pr. (N. Y.) 441.

It may be contended that this is waived by a plea of not guilty like the waiver to the qualification to a grand juror. We respectfully submit that this cannot be true, because when the record says that the sixteen men were empannelled it is presumed the court found them qualified.

> "The doctrine of waiver applies to all cases of objection to the qualification of jurors and to the

mode of empannelling the jury; but does not apply to cases where the proceeding is wholly void by reason of some fundamental defect or vice." U. S. Gale 109 U. S. 65; 27 L. Ed. 857; Rodriguez v. U. S. 198, U. S. 156, 49 L. Ed. 994; Watson's Case 87 Va. 612; Curtis' Case 87 Va. 589.

In speaking of the doctrine of waiver Mr. Justice Bradley in U. S. v. Gale, supra, said:

> "There are cases undoubtedly, which admit of a different consideration and in which the objection to the grand jury may be taken at any time. These are where the whole proceeding of forming the pannel is void; as where the jury is not a jury of a court or term in which the indictment is found; or has been selected by persons having no authority whatever to select them, *or where they have not been sworn.*" Approved in Rodriguz v. U. S., supra, by Mr. Justice Harlan.

But it may again be insisted because the indictment says itself that the grand jury was sworn that is sufficient, but that cannot be true, the authority to find an indictment is found in the record as entered by the clerk and not by the jurors themselves.

> "It does not appear that the grand jury were sworn, the recital of this fact in the bill of indictment cannot supply the omission of it in the record. The record may aid the indictment but not *econverso.* For the authority of the grand jury to find the indictment must be contained in the record and the bill becomes no part of the record until acted upon and returned into the court in the manner prescribed by law." Abram v. State, 25 Miss. 589.

III.

The indictment was defective and the fourth and sixth counts should have been stricken out. Wh. Cr. Pl. and Pr. Sec. 239; U. S. v. Cook, 17 Wall. 168; 21 L. Ed. 538. The fourth should negative the exception and the sixth count

should state that the material was fitted for distillation.

IV.

The jury that tried this case was not summoned as required by law. A jury must be selected and summoned as required by law and it is indispensible that it should so appear. Rodriguz, supra; Jones's Case, 87 Va. 63; 12 S. E. 26; Jones's Case, 100 Va. 843; 41 S. E. 951.

The petit jury was never sworn and this is indispensible.

> "The swearing of the jury—both grand and petit—is required by the law and it must in some way be manifest in the record." 1 Bish. Crm. Pro. sec. 1357; Johnson v. State, 47 Ala. 62; Jones v. State, 5 Ala. 656; State v. Rollins, 2 Frost. 528; Warren v. State, 1 Green 106; Harriman v. State, 2 Id. 207.

V.

The testimony of Colley should have been rejected or stricken out. Fitzpatrick v. U. S., 178 U. S. 304; 44L. Ed. 1079; Bram v. U. S., 168 U. S. 532; 42 L. Ed. 568; Brown v. Walker, 161 U. S. 561. 40 L. Ed. 819; Counselman v. Hitchcock, 142 U. S. 562; 35 L. Ed. 1110; U. S. v. Ball, 81 Fed. Rep. 837; Cullen's Case, 24 Gratt. (Va.) 721 Cooley's Const. Lim. 6 Ed. 385; McKelvey on Ev. Pages 299-303-305; Rex v. Garbett, Deinson Crown Cases 236; 2 Car & K, 474; 1 Green L. Ev. 16th Ed. sec. 216-254a-469b.

The admission of Powers before the Commissioner, Rush, was not such an admission as amounted to a judicial confession and it is essential they be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the confession. 1 Green L. Ev. Sec. 216.

The question asked of the defendant before the Commissioner was not cross-examination and by going on the stand he only waived his constitutional privilege as to cross-

examination, after that his constitutional privilege protected him.

> "A party has no right to cross-examine any witness, except as to facts and circumstances connected with the matter stated in his direct examination.
>
> If he wishes to examine him to other matters, he must do so by making the witness his own and calling him in the subsequent progress of the cause." Mr. Justice Story in Phila. & Trenton Ry. Co., v. Stimpson, 14 Pet. 448; 10 L. Ed. 535; Miller v. Miller, 92 Va. 510; 1 Green L. Ev. 445.

The defendant could stop at any place he chose and cross-examination could only go to facts and circumstances connected with the direct examination. Cooley's Const. Lim. 6 Ed. 384-86. His constitutional privilege protects him from cross-examination on any point not touched in his examination in chief. State v. Lurch, 12 Or. 99; 6 Pac. 408; State v. Bacon, 13 Or. 143; 8 Pac. 393; 57 Am. Rep. 8; State v. Saunders, 14 Or. 300; 12 Pac. 441; State v. Gallo, 18 Or. 435; 23 Pac. 264.

> "If the prosecution should compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of State v. Lurch is authority for saying that this would be error. It would be a clear case of the defendant being compelled to furnish original evidence against himself. State v. Saunders, 14 Orr. 300, is also authority for the proposition that he cannot be compelled to answer to any fact not relevant to his direct examination." Mr. Justice Brown in Fitzpatrick vs. U. S. supra.

If the defendant after going on the stand in his own behalf refuse to answer any question on cross-examination he could not be punished for it. The remedy in this case for the Government would be to strike out his evidence in

chief. The English doctrine being that the witness may claim his privilege at any time, even after having partially gone into the subject. Rex v. Garbett, supra. Can it be said that the English Common Law affords greater protection than that which we have crystalized into a constitutional provision. This seems to be the doctrine in Virginia sanctioned by the Legislature.

> "If any party required by another to testify on his behalf, refuse to testify, it shall be lawful for the court, officer, or person before whom the proceeding is pending to dismiss the action, suit, or other proceeding of the party so refusing as to the whole or any part thereof, or to strike out and disregard the plea, answer or other defense of such party, or any part thereof as justice may require. Va. Code Sec. 3350."

John Powers going on the stand before the Commissioner and giving testimony did not waive the Constitutional privilege as to such testimony at a later stage. Cullen's Case, 24 Gratt. (Va.) 624. For this evidence was clearly extorted by compulsion through fear of imprisonment.

> "The illegality of obtaining evidence by violating the privilege against self-crimination does not exclude it; but the privilege itself nevertheless operates to exclude it. 1 Green L. Ev. 16th Ed. Sec. 254a.
>
> No answer forced from him by the presiding judge, after he has claimed protection, can be afterwards given in evidence against him. 1 Green L. Ev. Sec. 469d, p. 615."

The defendant never waived his Constitutional privilege that he could not be compelled to be a witness against himself. He claimed his privilege when this question was propounded to him and the record says and Colley testified that he was without counsel and had never been warned.

> "The waiver of such a privilege as we are now considering, must always be made understandingly

and willingly, and generally after being fully warned by the court. Bolden Judge in Cullen v. Comth., 24 Gratt. 624; 1 Green L. Ev. Sec. 451."

This confession by the defendant was made under such circumstances that it was not admissable evidence even had it been made out of court. Bram v. U. S., supra.

> "The human mind under the pressure of calamity is easily seduced, and is liable in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination, or discourse with private persons, which is obtained from the defendant either by the flattery of hope or by the impression of fear, however alightly the emotions may be emplanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction." Note to Gilham's Case, 2 Moody 194.

Greenleaf says that it is essential in judicial confessions that they may be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the confession. 1 Greenl. Ev. Sec. 216.

The defendant not having waived his constitutional privilege because he was not advised, and if he should have waived it only, waived it so far as cross-examination and being entitled to stop at any time he desired the answer was clearly a violation of the 5th Amendment to the Constitution of the United States, which provides that no person in a criminal case shall be compelled to be a witness against himself. The compulsion mentioned has been defined or interpreted, that it need not be physical or mental, but comprehends that lesser degree of compulsion which subjects the citizen to some important disadvantage by the use of the means to procure the evidence which it is desired should be extracted from him. U. S. v. Ball, 81 Fed. Rep. 837. This Constitutional guaranty against being forced to

give incriminating testimony must have a broad and liberal construction in favor of the party and rights which it was intended to secure. Counselman v. Hitchcock, supra; Boyd v. U. S., 116 U. S. 616; 29 L. Ed. 746; 6 Sup. Ct. Rep. 524; Wilson v. U. S., 220 U. S; 31 Sup. Ct. Rep. 538.

Besides, Sec. 860 of the Rev. Stats. would prevent the evidence at the preliminary hearing to be used against the defendant at his final trial. If we do not misconstrue the recommendation of the Attorney General that this section be repealed, it was because such evidence could not be used. A similar section and the constitutional provision was construed by the United States Senate in the impeachment of Judge Swayne in 1905 to exclude such testimony, while the construction of the Senate is not decisive in such cases yet the construction that the lawmakers themselves place upon their own work should be very persuasive and that too after the able arguments upon this question by the numerous Senators who participated therein. Impeachment Proceedings of Judge Swayne see pages 187 to 199. It was held in Bram v. U. S., that a confession not voluntarily made was inadmissible in evidence under the 5th Amendment to the Federal Constitution. But aside from the constitutional question and the interpretation restricted as it may be by section 860 of the Revised Statutes; paraphrasing it so as to be applicable to this case it would read "No pleading of a party nor any discovery or evidence obtained from a party by means of a judicial proceeding in this country shall be given in evidence, or in any manner used against him or his property in any court of the United States in any criminal proceeding." If Congress could have had in mind a special case of which a statute being enacted would be applicable then I presume this was the case, for this discovery or evidence was obtained from a party while a witness in a judicial proceeding in this country and was afterwards used against him in a criminal proceeding.

For these reasons counsel confidently expect the judgment of the court below to be reversed.

S. H. SUTHERLAND,
R. A. AYERS,
Attorneys for Plaintiff in Error.

Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

JOHN POWERS, PLAINTIFF IN ERROR,
v.
UNITED STATES.
No. 152.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE UNITED STATES.

This writ of error presents a question concerning the privilege against self-incrimination.

The plantiff in error, John Powers (hereinafter called " the defendant "), was indicted under various charges in connection with the operation of an illicit still.

At the trial the court admitted, over objection and exception, testimony of one M. P. Colly, a deputy United States marshal, to the effect that in the preliminary hearing before the commissioner the defendant had stated:

> That he (the defendant) had worked at a distillery and made some brandy last fall

> near his (defendant's) house and he paid Preston Powers to assist him.
>
> That it was at a different time and about four miles from where he worked for Preston Powers beating the apples (Tr., p. 6.)

This repetition by Colly on the final trial of defendant's testimony at preliminary hearing was claimed to be a violation of the defendant's privilege on the following principal grounds:

(1) That the defendant had not been advised of his privilege by the commissioner.

(2) That by testifying at preliminary hearing he had not waived the privilege as to the formal trial and Colly's testimony constituted a violation of the privilege with respect to that trial.

(3) That the statement quoted by Colly was improperly obtained from the defendant before the commissioner.

Certain other grounds of error are assigned which it is not deemed necessary to discuss.

FIRST POINT.

The omission of the commissioner to advise the defendant of his privilege was not a breach of the privilege.

Furthermore, this defendant in fact resisted giving the answer and did so only under compulsion. There was nothing to show that he was not fully cognizant of his rights.

When the question was asked the defendant before the commissioner "he refused" as the Record states (p. 5) "to answer until informed by said

commissioner and deputy marshal that if he did not answer the question he would be committed to jail until he did answer, and not until he was thus compelled to answer did he answer the question."

This seems to make it evident that whether or not he actually was aware of his privilege he was not prejudiced by the failure of the commissioner to advise him of it, because he could not have made any more resistance to the answer than he actually made.

In *Wilson* v. *United States*, 162 U. S., 613, p. 623, a somewhat similar situation was ruled as follows:

> And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary, it is sufficient though it appear that he was not so warned. Joy on Confessions, *45, *48, and cases cited.
>
> In the case at bar defendant was not put under oath, and made no objection to answering the questions propounded. The commissioner testified that the statement was made freely and voluntarily, and no evidence to the contrary was adduced. Nor did defendant when testifying on his own behalf testify to the contrary. He testified merely that the commissioner examined him "without giving him the benefit of counsel or warning him of his right of being represented by counsel, or in any way informing

> him of his right to be thus represented." *He did not testify that he did not know that he had a right to refuse to answer the questions*, or that if he had known it he would not have answered. * * * He did not have the aid of counsel, and he was not warned that the statement might be used against him or advised that he need not answer. These were matters which went to the weight or credibility of what he said of an incriminating character, but as he was not confessing guilt, but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as matter of law. (P. 623; italics ours.)

But aside from these special considerations, the better rule appears to be (as indicated in the first sentence above quoted from the *Wilson* case) that the warning as to the privilege is not essential.

This is the rule preferred by Wigmore (Evidence, section 2269, pp. 3134–5) as follows:

> *Section 2269, Judge's warning to witness.*—It is plausible to argue that the witness should be warned and notified when an incriminating fact is inquired about, that he has by law an option to refuse an answer; and this view was often insisted upon, a century ago, by the leaders at the bar. [Citing Mr. Bearcroft, in Bembridge's Trial in 1783, and Mr. Erskine, in Watt's Trial in 1794.]

But there are opposing considerations. In the first place, such a warning would be an anomaly; it is not given for any other privilege; witnesses are in other respects supposed to know their rights, and why not here? In the next place, it is not called for by principle, since, until the witness refuses, it can hardly be said that he is compelled to answer, nor is it material that he believes himself compelled, for the court's action, and not the witness' state of mind, must be the test of compulsion. Again, the question can at any rate only be one of judicial propriety of conduct, for no one supposes that an answer given under such an erroneous belief should be struck out for lack of the warning. Finally, in practical convenience there is no demand for such a rule; witnesses are usually well enough advised beforehand by counsel as to their rights when such issues impend, and judges are too much concerned with other responsibilities to be burdened with the prevision of individual witnesses' knowledge; the risk of their being in ignorance should fall rather upon the party summoning than the party opposing.

Nevertheless it is plain that the old practice was to give such a warning when it appeared to be needed. But, as general knowledge spread among the masses, and the preparation for testimony became more thorough, this practice seems to have disappeared in England, so far at least as any general rule was concerned. In this country both the rule and the trial custom vary in the differ-

ent jurisdictions. No doubt a capable and painstaking judge will give the warning where need appears, but there is no reason for letting a wholesome custom degenerate into a technical rule.

SECOND POINT.

Unless defendant's privilege was violated at the preliminary hearing, it was not violated at all, for Colly's quotation, at the final trial, of what defendant had previously said was no new breach of the privilege.

We may concede that the defendant could not have been compelled to testify personally at his final trial, even though he voluntarily testified at preliminary hearing. That is not this case.

The testimony below was testimony of Colly, not of the defendant. The defendant was not on the witness stand. No new pressure was exerted on him. If his former admissions were not improperly extorted by the commissioner, it was competent for Colly to testify to them, just as to formal confessions.

Wilson v. *U. S.*, 162 U. S., 613, p. 623 *supra*.
Hardy v. *U. S.*, 186 U. S., 224, 228.
Moore v. *Com.*, 29 Leigh (Va.), 701.
State v. *Branham*, 13 So. Car., 389.
State v. *Mellon*, 120 North Car., 591.
Jackson v. *State*, 39 Oh. St., 37.
Ortiz v. *State*, 30 Fla., 256.
State v. *Burrell*, 27 Mont., 282.
Wigmore, §§ 850, 852, 2276 (pp. 971, 979, 3159, n. 10).

THIRD POINT.

The admissions of the defendant were not improperly obtained at the preliminary hearing before the commissioner, because they fell within his waiver of privilege.

The statements quoted on the trial by the witness Colly were made before the commissioner on cross-examination of the defendant. His own direct statement had been as follows:

> That he was about thirty steps (30 steps) of a still place, as testified by the Government witness, beating apples; that Preston Powers had hired him to work for him at the price of seventy-five cents (75c.) per day and that he put him to beating apples; that he (defendant) had no interest in the apples, or the product thereof, and had no interest or control of any still, but was merely hired to work by the day at the above-mentioned price.

This was all his testimony in chief. (Tr., p. 5.)

He was then asked by the deputy marshal (Colly) if he had not, at another time and place, within two years before the warrant, on which he was being tried, was sworn out, worked at a distillery. (Tr., p. 6.) He objected to making the answer, but under threats of contempt was compelled to give it. (Tr., p. 6.) He then made the statement, introduction of which on the final trial is here claimed to be error, namely:

> That he had worked at a distillery and made some brandy last fall near his (defendant's)

> house, and he paid Preston Powers to assist him; that it was at a different time and about four miles from where he worked for Preston Powers beating the apples.

No objection on the score of relevancy was taken to this testimony either before the commissioner or on the trial; and, in the discretion of the court, it was plainly relevant, both as bearing on the defendant's explanation of his presence at the still particularly charged;

> *Wood* v. *U. S.*, 16 Pet. 342, 345, 356, 360.
> *Buckley* v. *U. S.*, 4 How., 251, 259.
> *Wigmore, Evidence*, §§215, 242, 300-371.

and as bearing on his credibility.

> *Tla-Koo-Yel-Lee* v. *U. S.*, 167 U. S., 274.
> *Johnson* v. *Jones*, 1 Black, 209, 225.
> *Langhorne* v. *Com.*, 76 Va., 1016.
> *Wigmore on Evidence*, § 988 (p. 1142), 983 (p. 1114.)

And it is recognized that a defendant who takes the stand waives privilege as to questions along both these lines.

In *Brown* v. *Walker*, 161 U. S., p. 597, in distinguishing that case from cases in which the privilege did not exist or had been lost, defined the principle as follows:

> Stringent as the general rule is, however, certain classes of cases have always been treated as not falling within the reason of the rule, and, therefore, constituting apparent exceptions. When examined, these cases will all be found to be based upon the idea

that, if the testimony sought can not possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule ceases to apply, its object being to protect the witness himself and no one else—much less that it shall be made use of as a pretext for securing immunity to others.

1. Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure. (1 Greenl. Ev., s. 451; *Dixon* v. *Vale*, 1 C. & P., 278; *East* v. *Chapman*, 2 C. & P., 570; S. C. M. & M., 46; *State* v. *K——*, 4 N. H., 562; *Low* v. *Mitchell*, 18 Maine, 372; *Coburn* v. *Odell*, 10 Fost. (N. H.), 540; *Norfolk* v. *Gaylord*, 28 Connecticut, 309; *Austin* v. *Poiner*, 1 Sim., 348; *Commonwealth* v. *Pratt*, 126 Mass., 462; *Chamberlain* v. *Wilson*, 12 Vermont, 491; *Lockett* v. *State*, 63 Alabama, 5; *People* v. *Freshour*, 55 California, 375.)

So, under modern statutes permitting accused persons to take the stand in their own behalf, they may be subjected to cross-examination upon their statements. (*State* v. *Wentworth*, 65 Maine, 234; *State* v. *Witham*, 72 Maine, 531; *State* v. *Ober*, 52 N. H., 492; *Commonwealth* v. *Bonner*, 97 Mass., 587; *Commonwealth* v. *Morgan*, 107 Mass., 199; *Commonwealth* v. *Mullen*, 97 Mass., 545; *Connors* v. *People*, 50 N. Y., 240; *People* v. *Casey*, 72 N. Y., 393.)

In *State* v. *Wentworth*, 65 Me., 234, 243, it was held that the defendant by testifying had waived his privilege as to questions about other illegal sales of liquor than the one particularly charged. The court (by Appleton, C. J.) said:

> He was not obliged to testify. He does testify * * *. He exonerates himself. He denies the commission of the offense charged. He is subject to cross-examination, as the necessary result of his assuming the position of a witness * * *. If he discloses part, he must disclose the whole in relation to the subject matter about which he had answered in part. * * * Answering truly in part with answers exonerative, he can not stop midway, but must proceed, though his further answers may be self-criminative. Answering falsely as to the subject matter, he is not to be exempt from cross-examination, because his answers to such cross-examination would tend to show the falsity of those given on direct examination. If it were so, a preference would be accorded to falsehood rather than to truth.

Guy v. *State*, 90 Md., 29:

> Defendant charged with illegal sale of liquor. Testified that he did not make the sale. On cross-examination he was asked if he had a United States internal-revenue license. It was held that this question was a proper question and that he could not claim a privilege against it. The decision was made on the principle that a defendant, tak-

ing the stand and testifying in his own behalf, can be cross-examined as to any matter relevant to the issue, irrespective of the scope of his direct examination. For this principle Massachusetts, New York, Illinois, and Connecticut decisions are cited, all of which are on this brief.

Lawrence v. *State*, 103 Md., 17 (reaffirms *Guy* case).

State v. *Ober*, 52 N. H., 459:

> Illegal liquor selling; a defendant denying certain sales, held to have waived the privilege as to other sales; he is examinable "as to any and every matter pertinent to the issue;" "he places himself in the attitude of any ordinary witness, irrespective of any interest in the cause."

R. v. *D'Aoust*, 3 Ont. L. R., 653:

> An accused taking the stand may be asked as to prior convictions.

Norfolk v. *Gaylord*, 28 Conn., 309:

> Defendant not privileged as to other acts of intercourse.

State v. *Klitzke*, 46 Minn., 343:

> Bastardy: defendant denying the intercourse charged, compelled to testify as to other intercourse.

People v. *Dupounce*, (Mich.) 94 N. W., 388:

> The waiver extends to "any question, material to the case, which would in the case of any other witness be legitimate cross-examination," even though it involves some

other crime; here applied to questions concerning the rape intercourse which led to the charge of bastardy.

Connors v. *People*, 50 N. Y., 240:

Assault; questions as to former arrests, to affect credibility, allowed.

People v. *Casey*, 72 N. Y., 393, 398:

Questions as to former assaults, to affect credibility, allowed.

People v. *Tice*, 131 N. Y., 651, 655:

Approving *Connors* v. *People*; defendant not privileged as to questions affecting his credibility.

People v. *Webster*, 139 N. Y., 73, 84:

People v. *Tice* followed.

People v. *Rozelle*, 78 Cal., 84:

Defendant may be cross-examined by the same rule as other witnesses, except that the court has no discretion.

People v. *Meyer*, 75 Cal., 383:

Privilege waived as to cross-examination to character.

People v. *Gallagher*, 100 Cal., 466:

Same.

People v. *Arnold*, 116 Cal., 682, 687:

Same.

Smith v. *State*, 137 Ala., 22:

He becomes "subject to cross-examination and impeachment as are other witnesses."

People v. *Dole,* (Cal.) 51 Pac., 945:

A question as to a former admission, allowed.

State v. *Gaylord,* 35 Conn., 203, 207:

Murder; cross-examination to credit, allowed.

Wigmore analyzes as follows the important distinction between an accused who takes the stand on his own behalf and a third person called as a witness:

> The case of an *accused* in a criminal trial, who *voluntarily* takes the stand, is different. Here his privilege has protected him from being asked even a single question, for the reason that no relevant fact that could be inquired about would not tend to criminate him. (*Ante,* § 2260.) On this very hypothesis, then, his voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all. His situation is distinct from that of the ordinary witness with reference to the point of time when a waiver can be predicated, because the ordinary witness is compelled to take the stand in the first instance, and his opportunity for choice does not come till later, when some part of the criminating fact is asked for; while the accused has the choice at the outset. From the point of view of the actual prescience of witness and accused, the result is the same. Each knows well enough that the inquiries will be upon topics relevant to the

charge in issue; but that is immaterial. The question is, What does he know as to the connection between the first question and a possible subsequent incriminating question? Now the accused knows that there must always be such a connection; but in the witness' case there may or may not be such a connection, and if there is not, then his answer can not be a waiver. The result is, then, that the accused, as to all facts whatever (except those which merely impeach his credit and therefore are not related to the charge in issue), has signified his waiver by the initial act of taking the stand. (Sec. 2276, pp. 3153-3154.)

The controversy whether the waiver of privilege by a defendant extends to all things relevant to the issue, as held in—

Guy v. *State*, 90 Md., 29, *supra*.
Lawrence v. *State*, 103 Md., 17, *supra*.
Commonwealth v. *Nichols*, 114 Mass., 287.
Spies v. *People*, 122 Ill., 255.
State v. *Griswold*, 67 Conn., 290.
Clark v. *Jones*, 87 Ala., 71.
State v. *McGee*, 25 S. C., 247, 249 (citing prior South Carolina decisions).
People v. *Conroy*, 153 N. Y., 174.
People v. *Tice*, 131 N. Y., 651, 655.
8th Ency. Pleading and Practice, pp. 147 (note 5), 151 (note 1).
Wigmore, sec. 2276, pp. 3153-3154, *supra*.

or is limited to the scope of proper cross-examination, as was perhaps intimated (though not decided) in—

Spies v. *Illinois*, 123 U. S., 131, 180.
Fitzpatrick v. *U. S.*, 178 U. S., 304, 314–316.
Sawyer v. *U. S.*, 202 U. S., 150, 165–167.

is deemed immaterial here because the field of the direct examination was the whole fact of guilt or innocence, and any cross-examination that was relevant was necessarily within that field. Indeed, this is generally the case where the witness claiming the privilege is the defendant. (*Wigmore*, sec. 2276, p. 3155.)

FOURTH POINT.

The error, if any, was harmless.

There is nothing to indicate that the defendant was in the least degree prejudiced by the alleged error.

The point is one of those in which the discretion of the trial court should not be disturbed.

Holt v. *U. S.*, 218 U. S., 245.
Rea v. *Missouri*, 17 Wall., 532.
Willis v. *Russell*, 100 U. S., 621, 625.

FIFTH POINT.

The further grounds of error advanced in the brief were not assigned, nor have they any merit.

Since the above was printed a brief has been filed by plaintiff in error, in which it is claimed

for the first time that neither the grand jury nor the petit jury were summoned or sworn.

None of these alleged defects were assigned or ever mentioned before, either on the trial or anywhere in the record.

Considering their excessively technical nature, no occasion appears for the court to exercise its option reserved under rule 21, section 4.

Holmgren v. *U. S.*, 217 U. S., 509, 522–523.

But at any rate they have no merit.

In fact, as to the grand jury, the indictment itself recites that the jury was "*elected, impaneled, sworn, and charged*" and that they "*on their oaths present.*" (R., p. 2.)

Similarly, the petit jury were "*called and impaneled*" (R., p. 1), and "*being selected and tried in the manner prescribed by law, the truth of and upon the premises to speak,* and having heard the evidence, the arguments of counsel, and charge of the judge, retired to consider their verdict, *and upon their oaths* do say * * *." (R., p. 4.)

Notwithstanding these record proofs of the actual fact, it is claimed that the conviction should be reversed because the summoning and swearing are not also stated specifically in the clerk's entries—or rather in those particular selections from such entries which are given in this transcript. These selections do not pretend to show the complete entries, but merely certain "among other proceedings." (R., pp. 1, 4.)

But the authorities cited for the proposition do not support it. The most direct of them is *Crain* v. *U. S.*, 162 U. S., 625. In that case the record *nowhere* showed that the accused was arraigned or pleaded, and in the absence of some affirmative statement the court declined to infer those facts; and the court itself distinguished *Pointer* v. *U. S.*, 151 U. S., 396, 418, in which the situation was like that at bar—the indictment and other portions of the record supplied the omitted fact.

Furthermore, the defect, if any, was waived.

Rodriguez v. *U. S.*, 198 U. S., 156. Grand jury impaneled by deputy clerk instead of clerk. Assuming defect, it was waived.

U. S. v. *Gale*, 109 U. S., 65. Persons improperly excluded from panel.

Agnew v. *U. S.*, 165 U. S., 36. Defect in venire.

McInerney v. *U. S.*, 147 F. R., 183 (C. C. A., 1 C.). Same.

The judgment should therefore be affirmed.

WINFRED T. DENISON,
Assistant Attorney General.

JANUARY, 1912.

LORING C. CHRISTIE, *Attorney.*

O

24296—12——2

POWERS *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

No. 152. Argued January 22, 1912.—Decided February 19, 1912.

The objection that there was no *venire facias* summoning the grand jury is waived unless seasonably taken.

When the case gets to this court if the indictment shows that the grand jury was duly selected and sworn, it is enough to show the proper swearing of the grand jury. *Crain* v. *United States*, 162 U. S. 625, distinguished.

Where the conviction is a general one, one good count is sufficient to warrant affirmance. *Dunton* v. *United States*, 156 U. S. 185.

In this case the statements in the record as to the calling and impaneling of the petit jury sufficiently disclose, upon proceedings in error, that the petit jury was sworn.

Where the accused voluntarily becomes a witness in his own behalf before a commission, it is not essential to the admissibility of his testimony that he be first warned that what he says may be used against him. *Wilson* v. *United States*, 162 U. S. 613.

Where the record does not show that the accused on the preliminary hearing claimed his privilege under the Fifth Amendment or was ignorant of it but does show that he testified voluntarily and understandingly, his testimony cannot be excluded when subsequently offered at his trial.

A defendant testifying voluntarily, thereby waiving his privilege, may be fully cross-examined as to the testimony given, and in this case *held* that the cross-examination did not exceed the proper limits.

Section 860, Rev. Stat., has no bearing on the introduction in the same criminal proceeding of testimony of accused given voluntarily. *Tucker* v. *United States*, 151 U. S. 164.

THE facts, which involve the validity of a sentence after conviction for violating §§ 3258, 3279, 3281 and 3242 of the Revised Statutes of the United States, are stated in the opinion.

Mr. S. H. Sutherland, with whom *Mr. R. A. Ayers* was on the brief, for plaintiff in error:

There can be no grand jury for a United States court unless ordered by the judge, and the only method of summoning a grand jury is by *venire facias*. Rev. Stat., §§ 803, 810; 4 Fed. Stat. Ann. 742–744; *United States* v. *Antz*, 1[illegible] Fed. Rep. 119; *United States* v. *Reed*, 2 Blatchf. 435.

The grand jury which returned this bill of indictment was never sworn, and therefore could not return a true bill of indictment. Under Amendment V no court of the United States has authority to try a person without an indictment returned by a grand jury for an offense of this kind. *Ex parte Bain*, 121 U. S. 1; *Rowe* v. *State*, 20 So. Rep. (Ala.) 459; 2 Sawy. C. C. 667; Bishop Criminal Procedure, § 1357; *Barker* v. *State*, 39 Arkansas, 180; *Lyman* v. *People*, 7 Brad. (Ill.) 345; *Foster* v. *State*, 31 Mississippi, 421; *Abram* v. *State*, 25 Mississippi, 589; *Stokes* v. *State*, 24 Mississippi, 621; 4 Bl. Com. 302; 1 Chit. Crim. L. 178; Cooley's Const. L. 318.

It takes both impaneling and swearing to constitute a grand jury. Whatever is essential in a criminal proceeding to deprive a person of his liberty must appear of record and nothing is taken by intendment or implication. *Ball's Case*, 140 U. S. 118; *Hopt* v. *Utah*, 110 U. S. 574; *United States* v. *Crane*, 162 U. S. 625; *Barnes' Case*, 92 Virginia, 722; *Jones' Case*, 87 Virginia, 63; *Spurgeon's Case*, 86 Virginia, 652; *Cawood's Case*, 2 Virginia Cases, 527; *Rich* v. *People*, 1 Tex. App. 206.

No inference that they were sworn can be drawn from the word impaneled. *Layman* v. *People*, 7 Brad. (Ill. App.) 345; *Zapf* v. *State*, 35 Florida, 210; 7 So. Rep. 225; see also *State* v. *Potter*, 18 Connecticut, 166; *Porter* v. *People*, 7 How. Pr. (N. Y.) 441.

This right cannot be waived by a plea of not guilty like the waiver to the qualification of a grand juror. *United*

States v. *Gale*, 109 U. S. 65; *Rodriguez* v. *United States*, 198 U. S. 156; *Watson's Case*, 87 Virginia, 612; *Curtis' Case*, 87 Virginia, 589; *Abram* v. *State*, 25 Mississippi, 589.

The indictment was defective and the fourth and sixth counts should have been stricken out. Wh. Cr. Pl. and Pr., § 239; *United States* v. *Cook*, 17 Wall. 168.

The jury that tried this case was not summoned as required by law. A jury must be selected and summoned as required by law and it is indispensable that it should so appear. 1 Bish. Crim. Pro., § 1357; *Johnson* v. *State*, 47 Alabama, 62; *Jones* v. *State*, 5 Alabama, 656; *State* v. *Rollins*, 2 Fost, 528; *Warren* v. *State*, 1 Green, 106; *Harriman* v. *State*, 2 Id. 207.

Colly's testimony should have been rejected or stricken out. *Fitzpatrick* v. *United States*, 178 U. S. 304; *Bram* v. *United States*, 168 U. S. 532; *Brown* v. *Walker*, 161 U. S. 561; *Counselman* v. *Hitchcock*, 142 U. S. 562; *United States* v. *Ball*, 81 Fed. Rep. 837; *Cullen's Case*, 24 Gratt. 721; Cooley's Const. Lim., 6th ed. 385; McKelvey on Ev. 299; *Rex* v. *Garbett*, Dennison's Crown Cases, 236; 2 Car. & K. 474; 1 Greenl. on Ev., 16th ed., §§ 216, 254*a*, 469*b*.

The admission of Powers before the commissioner was not such an admission as amounted to a judicial confession; it is essential it be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the confession. 1 Greenl. on Ev., § 216.

A party has no right to cross-examine any witness, except as to facts and circumstances connected with the matter stated in his direct examination. If he wishes to examine him as to other matters, he must do so by making the witness his own and calling him in the subsequent progress of the cause. *Phila. & Trenton Ry. Co.* v. *Stimpson*, 14 Pet. 448; *Miller* v. *Miller*, 92 Virginia, 510; 1 Greenl. on Ev. 445.

The defendant could stop at any place he chose and the cross-examination could only go to facts and circumstances

connected with the direct examination. Cooley's Const. Lim., 6th ed., 384–386. His constitutional privilege protects him from cross-examination on any point not touched in his examination in chief. *State* v. *Lurch*, 12 Oregon, 99; 6 Pac. Rep. 408; *State* v. *Bacon*, 13 Oregon, 143; 8 Pac. Rep. 393; 57 Am. Rep. 8; *State* v. *Saunders*, 14 Oregon, 300; 12 Pac. Rep. 441; *State* v. *Gallo*, 18 Oregon, 435; 23 Pac. Rep. 264.

If the defendant after going on the stand in his own behalf refused to answer any question on cross-examination he could not be punished for it. The remedy in this case for the Government would be to strike out his evidence in chief.

Powers going on the stand before the commissioner and giving testimony did not waive the constitutional privilege as to such testimony at a later stage. *Cullen's Case*, 24 Gratt. (Va.) 624. For this evidence was clearly extorted by compulsion through fear of imprisonment.

The waiver of the privilege must always be made understandingly and willingly, and generally after being fully warned by the court. *Cullen* v. *Commonwealth*, 24 Gratt. 624; 1 Greenl. on Ev., § 451.

The confession by the defendant was made under such circumstances that it was not admissible evidence even had it been made out of court. *Bram* v. *United States*, *supra; United States* v. *Ball*, 81 Fed. Rep. 837.

The guaranty must have a broad and liberal construction in favor of the party and rights which it was intended to secure. *Counselman* v. *Hitchcock*, *supra; Boyd* v. *United States*, 116 U. S. 616; *Wilson* v. *United States*, 221 U. S. 361; § 860, Rev. Stat.

Mr. Assistant Attorney General Denison, with whom *Mr. Loring C. Christie* was on the brief, for the United States:

The omission of the commissioner to advise the de-

fendant of his privilege was not a breach of the privilege.

Furthermore, this defendant in fact resisted giving the answer and did so only under compulsion. There was nothing to show that he was not fully cognizant of his rights. *Wilson* v. *United States*, 162 U. S. 613, 623.

The warning as to the privilege is not essential. Wigmore on Evidence, § 2269.

Unless defendant's privilege was violated at the preliminary hearing, it was not violated at all, for Colly's quotation at the final trial, of what defendant had previously said, was no new breach of the privilege.

Defendant could not have been compelled to testify personally at his final trial, even though he voluntarily testified at the preliminary hearing.

The testimony below was that of Colly, not of the defendant. The defendant was not on the witness stand. No new pressure was exerted on him. If his former admissions were not improperly extorted by the commissioner, it was competent for Colly to testify as to them, just as to formal confessions. *Wilson* v. *United States*, 162 U. S. 613, 623; *Hardy* v. *United States*, 186 U. S. 224, 228; *Moore* v. *Commonwealth*, 29 Leigh (Va.), 701; *State* v. *Branham*, 13 S. Car. 389; *State* v. *Melton*, 120 N. Car. 591; *Jackson* v. *State*, 39 Oh. St. 37; *Ortiz* v. *State*, 30 Florida, 256; *State* v. *Burrell*, 27 Montana, 282; Wigmore, §§ 850, 852, 2276.

The admissions of the defendant were not improperly obtained at the preliminary hearing before the commissioner, because they fell within his waiver of privilege.

No objection on the score of relevancy was taken to this testimony either before the commissioner or on the trial; and, in the discretion of the court, it was plainly relevant, both as bearing on the defendant's explanation of his presence at the still particularly charged, *Wood* v. *United States*, 16 Pet. 342; *Buckley* v. *United States*, 4 How.

251, 259; Wigmore on Evidence, §§ 215, 242, 300, 371, and as bearing on his credibility, *Tla-Koo-Yel-Lee* v. *United States*, 167 U. S. 274; *Johnson* v. *Jones*, 1 Black, 209, 225; *Langhorne* v. *Commonwealth*, 76 Virginia, 1016; Wigmore on Evidence, § 988 (p. 1142), § 983 (p. 1114).

A defendant who takes the stand waives privilege as to questions along both these lines. *Brown* v. *Walker*, 161 U. S. 597; *State* v. *Wentworth*, 65 Maine, 234, 243; *Guy* v. *State*, 90 Maryland, 29; *Lawrence* v. *State*, 103 Maryland, 17; *State* v. *Ober*, 52 N. H. 459; *R. R. Co.* v. *D'Aoust*, 3 Ont. L. R. 653.

An accused taking the stand may be asked as to prior convictions. *Norfolk* v. *Gaylord*, 28 Connecticut, 309.

Defendant was not privileged as to other acts of intercourse. *State* v. *Klitzke*, 46 Minnesota, 343.

Bastardy; defendant denying the intercourse charged, compelled to testify as to other intercourse. *People* v. *Dupounce* (Mich.), 94 N. W. Rep. 388.

The waiver extends to "any question, material to the case, which would in the case of any other witness be legitimate cross-examination," even though it involves some other crime; here applied to questions concerning the rape intercourse which led to the charge of bastardy. *Connors* v. *People*, 50 N. Y. 240.

Assault; questions as to former arrests, to affect credibility, allowed. *People* v. *Casey*, 72 N. Y. 393, 398.

Questions as to former assaults, to affect credibility, allowed. *People* v. *Tice*, 131 N. Y. 651, 655.

Approving *Connors* v. *People;* defendant not privileged as to questions affecting his credibility. *People* v. *Webster*, 139 N. Y. 73, 84; *People* v. *Tice* followed; *People* v. *Rozelle*, 78 California, 84.

Defendant may be cross-examined by the same rule as other witnesses, except that the court has no discretion. *People* v. *Meyer*, 75 California, 383.

Privilege waived as to cross-examination to character.

People v. *Gallagher*, 100 California, 466; *People* v. *Arnold*, 116 California, 682, 687; *Smith* v. *State*, 137 Alabama, 22.

He becomes "subject to cross-examination and impeachment as are other witnesses." In *People* v. *Dole* (Cal.), 51 Pac. Rep. 945; a question as to a former admission was allowed, and *State* v. *Gaylord*, 35 Connecticut, 203, 207, a murder case, cross-examination as to credit, was allowed.

The controversy whether the waiver of privilege by a defendant extends to all things relevant to the issue, as held in *Guy* v. *State*, 90 Maryland, 29; *Lawrence* v. *State*, 103 Maryland, 17; *Commonwealth* v. *Nichols*, 114 Massachusetts, 287; *Spies* v. *People*, 122 Illinois, 255; *State* v. *Griswold*, 67 Connecticut, 290; *Clark* v. *Jones*, 87 Alabama, 71; *State* v. *McGee*, 25 So. Car. 247; *People* v. *Conroy*, 153 N. Y. 174; *People* v. *Tice*, 131 N. Y. 651, 655; 8th Ency. Pl. & Pr. 147, 151; Wigmore, § 2276, or is limited to the scope of proper cross-examination, as was perhaps intimated (though not decided) in *Spies* v. *Illinois*, 123 U. S. 131, 180; *Fitzpatrick* v. *United States*, 178 U. S. 304, 314; *Sawyer* v. *United States*, 202 U. S. 150, 165, is deemed immaterial here because the field of the direct examination was the whole fact of guilt or innocence, and any cross-examination that was relevant was necessarily within that field. Indeed, this is generally the case where the witness claiming the privilege is the defendant. Wigmore, § 2276, p. 3155.

The error, if any, was harmless.

There is nothing to indicate that the defendant was in the least degree prejudiced by the alleged error, and the discretion of the trial court should not be disturbed. *Holt* v. *United States*, 218 U. S. 245; *Rea* v. *Missouri*, 17 Wall. 532; *Willis* v. *Russell*, 100 U. S. 621, 625.

The further grounds of error advanced in the brief were not assigned, nor have they any merit. Plaintiff in error claims here for the first time that neither the grand jury nor the petit jury were summoned or sworn.

The defect, if any, was waived. *Rodriguez* v. *United States*, 198 U. S. 156; *United States* v. *Gale*, 109 U. S. 65; *Agnew* v. *United States*, 165 U. S. 36; *McInerney* v. *United States*, 147 Fed. Rep. 183.

MR. JUSTICE DAY delivered the opinion of the court.

Plaintiff in error (hereinafter called defendant) was convicted in the District Court of the United States for the Western District of Virginia under an indictment charging him with the violation of §§ 3258, 3279, 3281 and 3242 of the Revised Statutes of the United States. He was sentenced to a fine of $100 and to be imprisoned for a period of thirty days.

The indictment contained seven counts, charging the defendant substantially as follows: That he had in his possession a still and distilling apparatus for the production of spirituous liquors without having had such still and apparatus registered (first count); that he carried on the business of a distiller of spirituous liquors without having given bond (second count), and with the intent to defraud the United States of the tax on such liquors (third count), and also carried on the business of a retail liquor dealer without having paid the special tax therefor (seventh count); that he worked in a distillery for the production of spirituous liquors upon which no "Registered Distillery" sign was displayed (fourth count), and that he delivered raw material, namely, meal, to (sixth count), and conveyed distilled spirits from (fifth count), such distillery.

The case comes to this court, because of the alleged violation of a constitutional right, in compelling the defendant to be a witness against himself. This contention is developed in the bill of exceptions, which shows that at a preliminary hearing before a United States commissioner, after a witness for the Government had testified that he had seen the defendant beating apples at a "still

place" near the home of one Preston Powers, and about four miles from defendant's home, the defendant, without counsel and not having been instructed by the commissioner, voluntarily, in his own behalf, testified that he had beaten apples about thirty steps from the still place; that Preston Powers had hired him for seventy-five cents a day, and had set him to work beating apples, but that he had no interest in the apples, the product from them or the still, and no control of the still, and had merely been hired by the day at a fixed price; that thereupon M. P. Colly, deputy marshal, asked him if he had not worked at a distillery within two years of the warrant in this case, at another time and place, which question the defendant refused to answer until informed by the commissioner, and by the deputy marshal, that unless he did so he would be committed to jail, and he then testified that "he had worked at a distillery and made some brandy last fall near his house, and he paid Preston Powers to assist him"; that upon the trial of the case in the District Court that court, over the objection of the defendant, admitted the testimony of Colly, who repeated the proceedings before the commissioner, including the testimony of defendant, and that the court refused to strike out Colly's testimony or to instruct the jury to disregard it, upon the motion of defendant's counsel, to all of which, at the time, counsel for defendant duly excepted.

The contentions of the defendant are that the judgment should be reversed for the following reasons:

1st. There was no *venire facias* summoning the grand jury which found this purported indictment.

2nd. The said grand jury was not sworn and consequently could not find an indictment.

3rd. The indictment was defective and the demurrer should have been sustained to the fourth and sixth counts.

4th. The petit jury that tried this case was not sworn nor summoned.

5th. The testimony of Colly was illegal and incompetent testimony, and should have been rejected when offered, and if received striken out on counsel's motion.

As to the first, that there was no *venire facias* summoning the grand jury, there is nothing in the record to show that this objection, if tenable at all, was taken before plea or, indeed, at any time during the trial. Objections of this character are waived unless seasonably taken. *United States* v. *Gale*, 109 U. S. 65; *Agnew* v. *United States*, 165 U. S. 36; *Rodriguez* v. *United States*, 198 U. S. 156; *McInerney* v. *United States*, 147 Fed. Rep. 183.

The same observation applies to the second assignment of error, that the grand jury is not shown by the record to have been sworn. The indictment recites that the grand jury was selected, impaneled, sworn and charged, and that they on their oaths present, etc. At this stage of the proceedings this is enough to show the proper swearing of the grand jury. In *Crain* v. *United States*, 162 U. S. 625, cited by counsel for defendant, the record was destitute of any showing that the accused was arraigned or pleaded to the indictment. See *Pointer* v. *United States*, 151 U. S. 396, 418.

As to the assignment of error that there were certain defective counts in the indictment, the conviction was a general one, and, even if the counts were defective, as alleged, one good count, sufficient to sustain the sentence, is all that is required to warrant the affirmation of a judgment in error proceedings. *Dunbar* v. *United States*, 156 U. S. 185.

As to the objection that the petit jury was not sworn: The record discloses that they were "called and empaneled," and, "being selected and tried in the manner prescribed by law, the truth of and upon the premises to speak, and having heard the evidence, the arguments of counsel, and charge of the judge, retired to consider their verdict, and upon their oaths do say," etc. We

think that this sufficiently discloses, upon proceedings in error after conviction, that the petit jury was duly sworn.

The chief objection contended for in argument concerns the admission in the District Court of the testimony of the defendant before the commissioner. The admission of this testimony is claimed to have worked a violation of the defendant's constitutional rights under the Fifth Amendment to the Constitution, which protects him against self-incrimination. It appears from the bill of exceptions that the defendant voluntarily took the stand and testified in his own behalf. This he might do under the Federal statute (March 16, 1878, 20 Stat. 30, c. 37), making the defendant a competent witness, "at his own request, but not otherwise." We are of the opinion that it was not essential to the admissibility of his testimony that he should first have been warned that what he said might be used against him. In *Wilson* v. *United States*, 162 U. S. 613, Wilson was charged with murder. Before a United States commissioner, upon a preliminary hearing, he made a statement which was admitted at the trial. He had no counsel, was not warned or told of his right to refuse to testify, but there was testimony tending to show that the statement was voluntary. At pages 623, 624, this court said:

"And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary, it is sufficient though it appear that he was not so warned. Joy on Confessions, * 45, * 48, and cases cited.

". . . . He [Wilson] did not testify that he did not know that he had a right to refuse to answer the questions, or that, if he had known it, he would not have answered. . . . He did not have the aid of counsel;

and he was not warned that the statement might be used against him or advised that he need not answer. These were matters which went to the weight or credibility of what he said of an incriminating character, but as he was not confessing guilt but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as matter of law."

In the present case, it does not appear that the witness claimed his privilege, or was ignorant of it, or that if he had known of it would not have answered—indeed, the record shows that his testimony was entirely voluntary and understandingly given. Such testimony cannot be excluded when subsequently offered at his trial.

As to the contention that the cross-examination before the commissioner shown in the bill of exceptions was improperly extorted from the witness under threat of commitment, an examination of the bill of exceptions, we think, requires an answer overruling this exception. There is some difference of opinion expressed in the authorities, but the rule recognized in this court is that a defendant, who voluntarily takes the stand in his own behalf, thereby waiving his privilege, may be subjected to a cross-examination concerning his statement. "Assuming the position of a witness, he is entitled to all its rights and protection, and is subject to all its criticisms and burdens" and may be fully cross-examined as to the testimony voluntarily given. *Reagan* v. *United States*, 157 U. S. 301, 305. The rule is thus stated in *Brown* v. *Walker*, 161 U. S. 591, 597:

"Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure. 1 Greenl. Ev., § 451; *Dixon* v. *Vale*, 1 C. & P. 278; *East* v. *Chapman*,

2 C. & P. 570; *S. C.*, M. & M. 46; *State* v. *K*——, 4 N. H. 562; *Low* v. *Mitchell*, 18 Maine, 372; *Coburn* v. *Odell*, 10 Fost. (N. H.) 540; *Norfolk* v. *Gaylord*, 28 Connecticut, 309; *Austin* v. *Poiner*, 1 Sim. 348; *Commonwealth* v. *Pratt*, 126 Massachusetts, 462; *Chamberlain* v. *Willson*, 12 Vermont, 491; *Lockett* v. *State*, 63 Alabama, 5; *People* v. *Freshour*, 55 California, 375.

"So, under modern statutes permitting accused persons to take the stand in their own behalf, they may be subjected to cross-examination upon their statements. *State* v. *Wentworth*, 65 Maine, 234; *State* v. *Witham*, 72 Maine, 531; *State* v. *Ober*, 52 N. H. 492; *Commonwealth* v. *Bonner*, 97 Massachusetts, 587; *Commonwealth* v. *Morgan*, 107 Massachusetts, 199; *Commonwealth* v. *Mullen*, 97 Massachusetts, 545; *Connors* v. *People*, 50 N. Y. 240; *People* v. *Casey*, 72 N. Y. 393."

But it is contended by the defendant that the bill of exceptions shows that the alleged cross-examination was entirely irrelevant and improper, and not a legitimate cross-examination of the defendant's testimony in his own behalf. It appears that Powers testified, being charged with illegal conduct concerning the distillation of spirits, as already stated, that he was at a place about thirty steps from the still, beating apples, as testified by the Government's witness; that Preston Powers had hired him to work for him at the price of seventy-five cents a day, and that he put him to beating apples; that the witness had no interest in the apples or the product thereof and no interest in the still, but was merely hired to work by the day at the price of 75 cents. Having taken the stand in his own behalf, and given the testimony above recited, tending to show that he was not guilty of the offense charged, he was required to submit to cross-examination, as any other witness in the case would be, concerning matter pertinent to the examination in chief. The cross-examination, in the answer elicited, tended to

show that defendant had worked at a distillery the fall before with Preston Powers, the man he alleged he was working for at beating apples on the occasion when the Government witness saw him near the still, and had made brandy near his house, and had paid Preston Powers to assist him. This, we think, might be regarded as having some relevancy to the defendant's claim as to the innocent character of his occupation at the time charged. It had a tendency to show that defendant knew the character of the occupation in which he was then engaged, having worked before with Preston Powers at a distillery and made brandy with him, and did not exceed the limits of a proper cross-examination of the witness. As to the suggestion that § 860 of the Revised Statutes prevented the introduction of the testimony given by defendant before the commissioner, that section, providing that no pleading nor any discovery or evidence obtained from a party by means of a judicial proceeding, shall be used in evidence against him in a criminal proceeding, can have no bearing, where, as in the present case, the accused voluntarily testified in his own behalf in the course of the same proceeding, thereby himself opening the door to legitimate cross-examination. See *Tucker* v. *United States*, 151 U. S. 164, 168.

Judgment affirmed.